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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA AND LESLIE M. NISHIMURA, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE, PETITIONERS

v.

LADDIE F. JOSE, TRUSTEE OF JOSE BUSINESS TRUST AND JOSE FAMILY TRUST

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an appeal from a final order and permanent injunction entered by a district court—requiring the Internal Revenue Service to provide five-days advance notice to a taxpayer before the IRS may transfer summoned information from its Examination Division to any other IRS office—may be dismissed on the grounds that the appeal is not "ripe."

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America and Leslie M. Nishimura, petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App. *infra*, 1a-12a) is reported at 71 F.3d 1484. The opinion of the district court (App., *infra*, 13a-19a) and the findings and recommendations of the magistrate (App., *infra*, 20a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1995. A petition for rehearing was

denied on February 29, 1996 (App., *infra*, 22a-23a). On May 23, 1996, Justice O'Connor extended the time for filing a petition for a writ of certiorari to June 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. 26 U.S.C. 7602 provides, in relevant part:

(a) For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

(c)(1) No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

* * * * *

2. 26 U.S.C. 7604 provides, in relevant part:

(a) If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Whenever any person summoned under section * * * 7602 neglects or refuses to obey such summons * * *, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear

the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

3. 28 U.S.C. 1291 provides, in relevant part:

> The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court.

4. 28 U.S.C. 1292 provides, in relevant part:

> (a) * * * [T]he courts of appeals shall have jurisdiction of appeals from:
>
> > (1) Interlocutory orders of the district courts of the United States * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> * * * * *

STATEMENT

1. The Commissioner of Internal Revenue is authorized to issue administrative summonses to compel testimony under oath and the production of

books and records that may be relevant to the determination of any federal tax liability. 26 U.S.C. 7602(a). Such summonses may also be issued by the Commissioner to investigate any criminal "offense connected with the administration or enforcement of the internal revenue laws" (26 U.S.C. 7602(b)) if the Commissioner has not previously (i) referred the taxpayer's case to the Department of Justice for prosecution or (ii) been requested by the Department of Justice to provide information concerning the taxpayer's return in connection with a grand jury investigation or other court proceeding involving the taxpayer (26 U.S.C. 7602(c)(1) and (2)(A)).

The federal district courts have jurisdiction to enforce these administrative summonses by compelling "attendance, testimony, or production of books, papers, records, or other data." 26 U.S.C. 7604(a). Upon a prima facie showing that the summons was issued by the Commissioner in good faith and for a proper purpose (*United States* v. *Powell*, 379 U.S. 48, 57-59 (1964)), the judge is to (26 U.S.C. 7604(b)):

> make such order[s] as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

2. Respondent is the trustee of the Jose Business Trust and Jose Family Trust. Revenue Agent Nishimura is employed in the Examination Division of the Office of the District Director of Internal Revenue in Honolulu, Hawaii. In 1992, Agent Nishimura requested information from respondent relating to his examination of the income tax returns of the Jose Business Trust and Jose Family Trust for 1990 and

1991.[1] Respondent refused to comply with that request unless the agent agreed not to copy the documents or disclose them to any one else without respondent's permission (App., *infra*, 5a (Silver, J., dissenting)).

On November 3, 1992, the Internal Revenue Service served summonses on respondent directing him to appear, give testimony and produce for examination books, records and other data relating to the tax liability of the Trusts for 1990 and 1991. Respondent refused to comply with the summonses. The United States and Agent Nishimura therefore brought this enforcement suit in the district court (App., *infra*, 14a).

3. In declarations filed in support of the government's petition for enforcement, Revenue Agent Nishimura stated that the Internal Revenue Service was conducting an examination of the tax returns of the trusts for 1990 and 1991, that the Service was not conducting a criminal investigation of the Trusts or the trustee and that the Service had not made a criminal referral of the matter to the Department of Justice (App., *infra*, 21a). Respondent did not dispute that the summonses were issued for a valid, civil investigation purpose. He asked for protection, however, in the event that the records produced under the summonses were later to be used in connection with a criminal prosecution (*id.* at 5a (Silver, J., dissenting)).

The magistrate recommended an even broader restriction than respondent requested. The magis-

[1] That examination has led to the issuance of notices of deficiency for 1990 and 1991 against respondent and against the two trusts. Assessments of those deficiencies have been made but not collected. See note 2, *infra*.

trate acknowledged that the summonses were issued to respondent for a valid, civil investigative purpose and should be enforced (App., *infra*, 20a). The magistrate recommended, however, that enforcement be made subject to the following requirement: that the IRS Examination Division be precluded from disclosing any of the summoned material "to any other division of the I.R.S., including but not limited to the Criminal Investigation Division," without first giving five-days advance notice to respondent to allow him to object to the proposed disclosure (*id.* at 21a).[2]

4. The district court adopted the magistrate's recommendation (App., *infra*, 13a-19a). The court stated that the restrictions recommended by the magistrate against the internal disclosure of the summoned material within the Internal Revenue Service were justified because the statute governing summonses "does not address whether the IRS can seek documents for one stated purpose and then transfer the documents to another division for another unstated purpose" (*id.* at 18a). Although this Court has held that an internal revenue summons may be used in aid of a civil investigation that has the potential of resulting in a criminal prosecution against the taxpayer (*Donaldson* v. *United States*, 400 U.S. 517, 535 (1971)),[3] the district court concluded

[2] For reasons set forth in this petition, the documents obtained under the summonses have not been transferred to any other division of the Service and have thus not yet been made available for civil or criminal enforcement purposes.

[3] See also *United States* v. *Rosinsky*, 547 F.2d 249, 254 (4th Cir. 1977) (subsequent recommendation of criminal prosecution does not alter validity of IRS summons); *United States* v. *Cromer*, 483 F.2d 99, 101 (9th Cir. 1973) (IRS summons valid

that respondent should be given the opportunity to object to any transfer of the summoned material among the divisions of the Internal Revenue Service (App., *infra*, 17a-19a). Relying on the decisions of the Ninth Circuit in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525 (9th Cir. 1986), and *United States* v. *Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987), aff'd on this issue by an equally divided Court, 491 U.S. 554, 556 (1989)—which involved restrictions on IRS disclosures of summoned information to agencies *outside* of the IRS for purposes other than a criminal tax investigation—the district court stated that "monitoring the IRS' use of summonsed documents" is an appropriate exercise of its discretion "to determine the terms of enforcement" (App., *infra*, 17a).

5. A divided panel of the Ninth Circuit dismissed the government's appeal "as not ripe" (App., *infra*, 2a). The majority noted that the Internal Revenue Service had represented to the district court that the documents were requested for civil tax examination purposes, not for a criminal investigation. The majority also noted that the record did not indicate that the Examination Division of the Internal Revenue Service had attempted to disclose the documents to any other Division of the Service, "thereby triggering the five-day notice requirement" (*ibid.*). The majority stated, without further explanation or analysis, that "any detrimental impact the district court's order may have on the IRS's investigation is, at this time, purely speculative" and that "the IRS's appeal is not ripe for review" (*ibid.*).

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where criminal recommendations were not made until after issuance of summons).

Judge Silver filed a lengthy dissent in which she noted, at the outset, that "[t]he majority opinion is puzzling" (App., *infra*, 3a). In her view, the appeal should not have been dismissed for lack of ripeness. Instead, it should have been decided on the merits in favor of the government (*id.* at 3a-12a).

Judge Silver noted that a case is ripe for review when, as here, the claim presented for adjudication is not dependent on the uncertain occurrence of remote or contingent future events (App., *infra*, 3a, citing *Dames & Moore* v. *Regan*, 453 U.S. 654, 689 (1981)). She noted that the restrictions imposed by the district court on the transfer of summoned information are presently in force and "have a chilling effect on the IRS's ability to conduct effective tax investigations, particularly in the criminal context" (App., *infra*, 4a). When appellate review is sought of an existing, final order that governs the present conduct of the parties, Judge Silver concluded that "the judiciary has a duty not to interpret the doctrinal roots of ripeness simply to avoid making a decision" (*id.* at 3a).

Reaching the merits, Judge Silver explained that the order entered by the district court was invalid because "Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct" (App., *infra*, 9a, quoting *Donaldson* v. *United States*, 400 U.S. at 535 (emphasis omitted)) and because "the restrictions placed on the summonses in this case exceeded the limited power of the court in granting or denying the enforcement of the summonses" (App., *infra*, 11a, citing *United States* v. *Abrahams*, 905 F.2d 1276, 1287 (9th Cir. 1990)). She concluded that the decision of the district court "is invalid now and does not need the passage of time to

enhance or remedy its invalidity," for the case "is mature, fully developed, seasoned, ready and ripe for picking" (App., *infra*, 4a, 5a).

REASONS FOR GRANTING THE PETITION

The court of appeals erroneously concluded that a final order of the district court that imposes injunctive restrictions on the internal use of summoned information by the Internal Revenue Service is not ripe for appellate review because the "record does not indicate that the Examination Division has attempted to disclose the documents to any other IRS division" (App., *infra*, 2a). That decision deprives the agency of the opportunity to seek appellate review of the injunction in advance of a proceeding for its enforcement. It is therefore directly in conflict with cases holding that injunctions may be appealed in advance of enforcement either (i) as final orders under 28 U.S.C. 1291 or (ii) as interlocutory orders under the statutory exception to the final judgment rule provided by 28 U.S.C. 1292(a)(1).

The question presented is of substantial administrative importance. As the dissenting opinion describes in detail (App., *infra*, 3a-4a, 11a-12a), the restrictions imposed by the injunction, and by the court of appeals' refusal to hear the appeal from that injunction, significantly interfere with the agency's ability to conduct effective tax investigations.

1. This case involves an appeal from a final order of a district court enforcing compliance with an administrative summons under 26 U.S.C. 7602(b). That order granted affirmative relief to both parties: (i) it required the taxpayer to produce the summoned information; and (ii) it enjoined the Internal Revenue

Service from transferring that information to any office other than the agency's Examination Division without first giving the taxpayer five days advance notice, in order to allow the taxpayer an opportunity to object in court to the transfer (App., *infra*, 18a).

An order that grants affirmative relief in a summons enforcement proceeding is appealable as of right under 28 U.S.C. 1291 as a "final decision[] of the district court[]" (*ibid.*). See also Fed. R. App. P. 3(a). It is, of course, well established "that IRS summons enforcement orders *are* subject to appellate review" under this statute. *Church of Scientology of California* v. *United States*, 506 U.S. 9, 15 (1992), citing *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). The court of appeals therefore acknowledged that it had "jurisdiction pursuant to 28 U.S.C. § 1291" in this case (App., *infra*, 2a).

Orders that include injunctive relief—such as the order in this case—may also be appealed under the statutory exception to the final judgment rule provided by 28 U.S.C. 1292(a)(1). See generally *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 178-181 (1955); 11A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 2962 (2d ed. 1995). This statute authorizes the courts of appeals to hear appeals from "[i]nterlocutory orders of the district courts * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." 28 U.S.C. 1292(a)(1). The order entered by the district court in this case "imposed independent obligations on the government of the sort that are routinely appealable under [28 U.S.C.] 1292(a)(1)." *United States* v. *Bedford Assoc.*, 618 F.2d 904, 915 (2d Cir. 1980).

An order that grants or denies injunctive relief is immediately appealable as a matter of right. An injunction disturbs the *status quo ante* by making the proscribed conduct subject to punishment for contempt. An order on the merits that requires or proscribes specific conduct by a party is immediately appealable because "Congress * * * thought serious consequences might result from compliance with injunctive orders during the pendency of litigation." *Cohen* v. *Board of Trustees of Univ. of Medicine*, 867 F.2d 1455, 1465 (3d Cir. 1989) (en banc). This Court noted as long ago as *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 525 (1897), that Congress has permitted "the defendant to obtain immediate relief from an injunction" because "the continuance of [the injunction] throughout the progress of the cause might seriously affect his interests."

Prior to the decision in this case, the courts of appeals had thus consistently held that "the party enjoined" may appeal immediately even if the only injury threatened is "that resulting from the availability of pendente lite enforcement by contempt" (*Cohen* v. *Board of Trustees of Univ. of Medicine*, 867 F.2d at 1467, citing, *e.g.*, *Smith* v. *Vulcan Iron Works*, 165 U.S. at 525, *Baltimore Contractors* v. *Bodinger*, 348 U.S. at 182). See also *Sherry A.D.* v. *Kirby*, 975 F.2d 193, 203 (5th Cir. 1992) ("no additional finding of a threat of immediate, irreparable injury is required"); *United States* v. *Bayshore Assoc., Inc.*, 934 F.2d 1391, 1396 (6th Cir. 1991); *EEOC* v. *Kerville Bus Co.*, 925 F.2d 129, 132 (5th Cir. 1991) (orders that explicitly grant, deny or modify an injunction are appealable "as of right, right away"); *Tri-State Generation and Transmission Assoc., Inc.* v. *Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989).[4]

Without discussing this settled case law (or any other legal authorities), and in defiance of the statutes that provide for immediate appellate review of injunctions that are enforceable by contempt, the court of appeals stated that the agency should first be required to show that it "has attempted to disclose the documents to any other IRS division" before it may appeal (App., *infra*, 2a). The court evidently believed that a party must defy an injunction in order to obtain appellate review.[5] That holding, of course,

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[4] In *Carson* v. *American Brands Inc.*, 450 U.S. 79 (1981), the Court considered whether 28 U.S.C. 1292(a)(1) permitted an appeal from an order denying a joint motion for approval of a consent decreee that contained an injunction as one of its provisions. Because the order did not, on its face, deny an injunction, an appeal from the order did not fall precisely within the language of the statute. The Court concluded that such an order could nonetheless be appealed if the "practical effect" of denying the motion "might have a 'serious, perhaps irreparable, consequence.'" 450 U.S. at 84. That "requirement of irreparable injury" does not apply to appeals from orders that specifically grant, deny or modify an injunction. Such orders are directly within the scope of 28 U.S.C. 1292(a)(1). *Shee Atika* v. *Sealaska Corp.*, 39 F.3d 247, 248-249 (9th Cir. 1994); *Sherri A.D.* v. *Kirby*, 975 F.2d at 203 n.14.

[5] Obviously, if the government *complies* with the injunction —by providing five-days notice in advance of an "attempt[] to disclose the documents"—it would not be able to obtain appellate review of the injunction. If the government does *not* comply with the injunction, its "attempt[] to disclose the documents" would be punishable by contempt. See *United States* v. *United Mineworkers of America*, 330 U.S. 258, 293 (1947).

Because the Service routinely transfers documents and information among its Divisions and Offices (see pages 16-19,

conflicts with the numerous appellate decisions that authorize immediate appellate review of injunctions.[6] It also cannot be reconciled with the decision of this Court in *United States* v. *United Mineworkers of America*, 330 U.S. 258 (1947), which held that "an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *Id.* at 293. The "orderly" and "proper" procedure contemplated by this Court in *United Mineworkers* is for the enjoined party to appeal the injunction in advance of enforcement, rather than

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infra), there is nothing "speculative" (App., *infra*, 2a) about the need of the Service to make such transfers or the injury to its investigations occasioned by the challenged order. If the government were required to identify in advance of appeal the disclosures that it intends to make, that obviously would effect substantially the same injury that the injunction itself would cause. See *id.* at 4a, 10a (Silver, J., dissenting).

[6] The decision dismissing the government's appeal from a final summons enforcement order in this case is also inconsistent with a prior decision of the Fifth Circuit and with three prior decisions of the Ninth Circuit in which the courts reviewed the merits of summons enforcement orders that contained restrictions on the agency's use of summoned information. See *United States* v. *Barrett*, 837 F.2d 1341, 1349-1351 (5th Cir. 1988), cert. denied, 492 U.S. 926 (1989); *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1525 (9th Cir. 1986); *United States* v. *Zolin*, 809 F.2d at 1416-1417; *United States* v. *Abrahams*, 905 F.2d at 1286-1287. Those cases all stood in the same procedural posture as the present case. Even though the IRS had not attempted to defy the injunctions by transferring information in violation of their terms, the courts addressed the validity of the injunctions on their merits under the jurisdiction conferred on them by 28 U.S.C. 1291, 1292. The courts perceived no procedural bar to deciding the substantive merits of those cases.

make a "private determination of the law" on the "peril" of contempt. *Ibid.* See also *Howat* v. *Kansas*, 258 U.S. 181, 189-190 (1922) ("until its decision is reversed for error by orderly review, either by itself or by a higher court," disobedience of an injunction "is contempt").

2. The court of appeals stated in its summary order that it was "purely speculative" whether the injunction entered in this case has any detrimental impact on the agency (App., *infra*, 2a).[7] In making that statement, however, the court wholly failed to consider or address the effect that such an injunction has on the investigations that Congress has directed the agency to conduct. Judge Silver correctly stated in dissent (App., *infra*, 3a-4a) that the requirement of prior disclosure in the challenged injunction materially impairs the agency's ability to conduct effective criminal and civil tax investigations.[8]

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[7] The court of appeals evidently assumed that the injunction entered by the district court threatened no real injury to the agency (other than its exposure to the sanctions of contempt). If, as the court seemingly assumed, there is no basis for believing that the agency would ever need to transfer taxpayer information among its divisions, and *if* that were a valid basis for concluding that there is no genuine case or controversy concerning the subject of the injunction, the proper disposition of the case would have been for the court "to vacate" the injunction, not leave it in place. See *Webster* v. *Reproductive Health Serv.*, 492 U.S. 490, 512 (1989). See also *Zimmer* v. *Connett*, 640 F.2d 208, 209 (9th Cir. 1981) (complaint seeking injunction dismissed for failure to state a claim that was ripe for adjudication); *Dresser Industries, Inc.* v. *United States*, 596 F.2d 1231, 1235 (5th Cir. 1979), cert. denied, 444 U.S. 1044 (1980) (same).

[8] IRS summons enforcement proceedings are designed to be "summary" in nature. *Donaldson* v. *United States*, 400 U.S. at

a. Under the district court's order, agents assigned to the case in the Examination Division must first notify respondent and then wait five days (or longer if respondent objects) before sharing any of

529; *United States* v. *Rylander*, 460 U.S. 752, 756 (1983). An expeditious mechanism for enforcement is essential because delay can seriously interfere with the agency's investigatory authority. The role of the judiciary in a summons enforcement action is therefore a limited one—to guard against abuses of the power to summon documents or testimony. See, *e.g.*, *United States* v. *Powell*, 379 U.S. at 57-58; *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975). The Court has consistently held that restrictions on the IRS's summons authority should not be imposed "'absent unambiguous directions from Congress.'" (*United States* v. *Arthur Young & Co.*, 465 U.S. 805, 816 (1984), quoting *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975)).

The injunction left in place by the decision in this case implicates an existing conflict between the Fifth and the Ninth Circuits on the underlying question whether courts have authority to place restrictions on the use of summoned materials by the Internal Revenue Service. Compare *United States* v. *Barrett*, 837 F.2d 1341, 1351 (5th Cir. 1988), with *United States* v. *Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987). That underlying conflict has been before this Court but was not resolved because the Court was evenly divided on that issue. *United States* v. *Zolin*, 491 U.S. at 556. Because the affirmance in *Zolin* was by an evenly divided Court, that decision is not "authority for the determination of other cases, either in this or in inferior courts." *Hertz* v. *Woodman*, 218 U.S. 205, 213-214 (1910). Moreover, the Ninth Circuit's decision in *Zolin* does not, by its terms, authorize restrictions on the *internal* use of summoned information by the IRS. See App., *infra*, 10a (Silver, J., dissenting). In this case, as the dissenting judge indicated, the court of appeals, by failing to exercise its responsibility to hear the government's appeal, "avoid[ed] making a decision" on the underlying legal question on which the circuits have expressed conflicting points of view (*id.* at 3a).

the summoned materials with other divisions of the agency. The need to provide such notification prior to each transfer of information would disrupt the conduct of even a routine examination.

A fundamental premise of tax examinations is that the Examination Division is to share and coordinate taxpayer information among the various components within the agency. During a typical examination in which summoned information is obtained, a revenue agent will coordinate with other IRS divisions such as the Appeals Office, the Office of Chief Counsel, the Collection Division and the Criminal Investigation Division. See generally Michael I. Saltzman, *IRS Practice and Procedure* chs. 8-14 (2d ed. 1991). This sharing of information and knowledge is a basic tool that must be available to Examination personnel in conducting their day-to-day examinations in such cases. See, *e.g.*, Internal Revenue Manual ¶¶ 4292.2(5), 4563.431, 4562.7(3), 4713(3) and 8969(1)(f).

The district court's order not only requires the Examination Division to provide prior notification to respondent before sharing summoned materials with other IRS components in the field. It also requires prior notification to be provided in the event consultation is sought with higher, supervisory levels of IRS management—such as the district director, regional director or the IRS National Office.[9] The injunction thus contemplates routine judicial involvement in the processes employed by the

[9] In the course of an audit, a revenue agent may request information or technical advice from the National Office. See Rev. Proc. 94-2, 1994-1 C.B. 428. When the audit has reached the point that a notice of deficiency notice is to be issued, the agent's determinations are frequently subject to review by the IRS District Counsel. Internal Revenue Manual ¶ 4469

Secretary of the Treasury, the Commissioner of Internal Revenue and their delegates in supervising the administration and enforcement of the internal revenue laws. See 26 U.S.C. 7801-7803.

The mischief worked by the injunction is also evident in its effect on the ability of examining agents to consult with attorneys at IRS district counsel and regional counsel offices. See Internal Revenue Manual ¶¶ 403(20)(2)-(5), 4022.10(4)(1). It is not uncommon for agents to seek advice from counsel during the course of an audit. Under the injunction, however, agents in the Examination Division must first notify the taxpayer and permit the court an opportunity to exercise review over whether the information may be used to obtain such advice.

There is no basis in the statute for such pervasive judicial interference with the normal administrative processes of the agency.[10] In the context of both tax investigations (see note 8, *supra*) and analagous agency actions, non-statutory, judicially-imposed restrictions on the enforcement of summonses and on the use of summoned information are routinely rejected because they would impede and burden legitimate agency investigations. See, *e.g.*, *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 750 (1984) (a requirement that the agency notify potential targets when serving subpoenas "would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the Commission"); *Dole* v. *Service Employees Union*, 950

[10] Although Congress has restricted the dissemination of taxpayer information in many contexts, it has not imposed any limitation on the use of tax return information in the conduct of examinations within the agency. See 26 U.S.C. 6103.

F.2d 1456, 1462 (9th Cir. 1991) (restrictions on internal use of subpoenaed documents by the Department of Labor reversed as unnecessarily burdensome to investigation).

b. An investigation that commences as a civil tax inquiry may evolve into a collection case or a criminal matter. The case file and the summoned material may thus be transferred to the Collection Division, the Criminal Investigation Division or to the Justice Department. The injunction entered in this case requires that, each time the information moves within the IRS, notice is to be given to the taxpayer so that the court may exercise an evidently perpetual review of the agency's use of the information.

The dissenting judge correctly notes (App., *infra*, 8a-10a) that the injunction entered by the district court in this case may have been founded on a mistaken premise that different standards may apply when the agency is summoning information for criminal rather than civil investigations. But the statute plainly permits the agency to summon relevant information for criminal as well as civil tax investigations, and the same standard is applicable in both contexts. See 26 U.S.C. 7602(b); *Donaldson* v. *United States*, 400 U.S. at 535-536 ("Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct."); pages 7-8 & note 3, *supra*.[11] As Judge Silver stated in dissent (App., *infra*, 12a):

[11] Indeed, Congress added subsections (b) and (c) of Section 7602 to the Code in 1982 to clarify this very point, in agreement with the views expressed in the dissenting opinion in *United States* v. *LaSalle National Bank*, 437 U.S. 298, 319-321 (1978). See S. Rep. No. 494, 97th Cong., 2d Sess. 285-287 (1982); *Pickel* v. *United States*, 746 F.2d 176, 183-184 (3d Cir. 1984).

> [T]he majority opinion produces the anomalous result that the IRS, with significant congressionally created powers of civil and criminal law enforcement, faces a real threat of compromising a criminal investigation because it employs one of those powers —a summons.

It is not difficult to perceive "how the restriction could hamper a criminal investigation which may emerge during the civil investigation if the IRS were required to notify the taxpayer of its intention to redirect the investigation to the Criminal Division and then *wait* five days for an objection. During that five-day period of time despite the anticipated need to seek search warrants, arrest warrants, wire interceptions, or to initiate an undercover or a grand jury investigation, the government would be paralyzed and precluded from taking any such action during the holding period. The restriction could well shatter any possibility of an effective criminal investigation and potential prosecution." App., *infra*, 11a (Silver, J., dissenting). Similarly, in the civil collection context, the notice requirement would provide taxpayers with a warning that collection actions were about to commence and would allow taxpayers "who have something to hide" (*SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. at 750) an opportunity to move or conceal assets. The district court's order would also require the government to inform the taxpayer of deliberative processes that are normally confidential.

3. Judge Silver correctly concluded that "[t]his case is mature, fully developed, seasoned, ready and ripe" (App., *infra*, 5a). There is no support for the "puzzling" (*id.* at 3a) suggestion of the majority in this case that a litigant should attempt to defy an

injunction as a prerequisite of appealing it. To the contrary, the "orderly" and "proper" procedure is to appeal the injunction in advance of enforcement. *United States* v. *United Mineworkers*, 330 U.S. at 293. Other appellate courts have consistently allowed appeals from injunctions to be heard in advance of enforcement. See pages 12-14, *supra*. By requiring the government to "attempt[] to disclose the documents" (App., *infra*, 2a) before permitting an appeal from an injunction that proscribes that very conduct in this case, the decision of the court of appeals conflicts with these numerous decisions.

Indeed, the order dismissing the appeal in this case so far departs from the accepted and usual course of judicial proceedings that correction by this Court is warranted on that basis alone. Rule 10.1(a) of the Rules of this Court. The Court therefore may deem summary reversal to be appropriate in this case. See, *e.g.*, *Calderon* v. *Moore*, No. 95-1612 (June 17, 1996) (summarily reversing and remanding for consideration of the merits).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1996

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-17028

D.C. No. Misc-92-00169-DAE

UNITED STATES OF AMERICA; LESLIE M. NISHIMURA, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE, PLAINTIFFS-APPELLANTS

v.

LADDIE F. JOSE, TRUSTEE OF JOSE BUSINESS TRUST AND JOSE FAMILY TRUST, DEFENDANT-APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII
DAVID A. EZRA, District Judge, Presiding

Argued and Submitted
September 14, 1995—San Francisco, California

Filed December 7, 1995

ORDER AND DISSENT

Before: ALEX KOZINSKI and MICHAEL DALY HAWKINS, Circuit Judges, and ROSLYN O. SILVER,* District Judge.

Dissent by Judge SILVER

ORDER

The Internal Revenue Service appeals the district court's order conditionally enforcing two summonses served on Laddie F. Jose as Trustee of the Jose Business Trust and Jose Family Trust. The IRS challenges the condition of enforcement that requires the Examination Division to give Jose five days notice before disclosing to any other division of the IRS documents produced by Jose. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we dismiss the appeal as not ripe.

The record indicates that the IRS represented to the district court that the documents requested of Jose were for civil tax examination purposes only, not for a criminal investigation. The record does not indicate that the Examination Division has attempted to disclose the documents to any other IRS division, thereby triggering the five-day notice requirement. Thus, any detrimental impact the district court's order may have on the IRS's investigation is, at this time, purely speculative. Accordingly, the IRS's appeal is not ripe for review.

The appeal is DISMISSED.

SILVER, District Judge, Dissenting:

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* Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

Because I would decide this case on the merits and not dismiss it for lack of ripeness, I respectfully dissent.

The majority opinion is puzzling.

Courts have invoked the ripeness doctrine and refused to decide matters which would involve "entangling themselves in abstract disagreements . . . ." *Abbott Laboratories v. Gardner*, 87 S. Ct. 1507, 1515 (1967). Generally, those cases involve situations with very uncertain, remote or contingent events. *Dames & Moore v. Regan*, 101 S. Ct. 2972, 2991-92 (1981); *Webster v. Mesa*, 521 F.2d 442, 444 (9th Cir. 1975) (a challenge to a statutory provision requiring independent candidates to win a total percentage vote in the primary election was not ripe because no independent candidate had ever been disqualified by the statute which made the issue hypothetical). Courts have also relied on the ripeness doctrine in refusing to hear cases where the facts needed further development. *Wheeler v. Barrera*, 94 S. Ct. 2274 (1974) (the state should be given the opportunity to comply with a federal program before a decision on compliance could be made). Cases which do not have a concrete impact on the parties, *Exxon v. Heinze*, 32 F.3d 1399, 1404 (9th Cir. 1994); or where administrative or governmental action is not final, *Kinzli v. Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987), have been found not to be ripe for decision.

But where the facts are clear and the district court's decision is erroneous the judiciary has a duty not to interpret the doctrinal roots of ripeness simply to avoid making a decision. Although it is now clear that the district court has abused its discretion, if the

IRS proposes to transfer the case to the Criminal Investigation Division, the majority would have the Service make a second trip to this Court to argue the identical position already made in briefs and at oral argument which established the district court's error. The decision is invalid now and does not need the passage of time to enhance or remedy its invalidity. It is wrong today and it will be wrong tomorrow.

Furthermore, the ripeness doctrine recognizes that there is a need to decide a case when the prospect or fear of future events may have a real impact on the present affairs of the parties and cause potential harm. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 657 n.1 (zoning ordinance of itself affected adversely the value of land and thereby constituted a sufficient threat of injury), *cert. denied*, 97 S. Ct. 731 (1976); *Assiniboine & Sioux Tribes v. Board of Oil and Gas*, 792 F.2d 782, 788 (9th Cir. 1986). In this case the restrictions imposed by the District Court Order have a chilling effect on the IRS's ability to conduct effective tax investigations, particularly in the criminal context. *See* Herbert L. Zuckerman, *Check List of Do's and Don'ts in Handling a Tax Fraud Investigation*, 29 NYU Instit. on Fed. Taxation, 987, 998 (1971) (time is a taxpayer's ally). To require the IRS to provide notice of a proposed transfer to the Criminal Investigation Division and then suspend the investigation for five days would communicate to the world that a criminal investigation had ensued which certainly could impede and compromise that investigation. It does not take a soothsayer to prognosticate what would happen if the IRS decided to convert the civil investigation to a criminal one and was then required to notify the taxpayer, now a putative defendant, of such proposed transfer. The five-

day waiting period would inevitably destroy the effectiveness of any contemplated confidential criminal investigative tool such as a search warrant, arrest warrant, wire interception, or the initiation of a grand jury investigation.

This case is mature, fully developed, seasoned, ready and ripe for picking.

PROCEDURAL BACKGROUND

The IRS has appealed the District Court Order adopting a Magistrate's Order that recommended enforcement of two summonses served on Laddie F. Jose as Trustee of the Jose Business Trust and Jose Family Trust, the Respondent. The IRS challenges the condition appended by the district court to the enforcement of the summonses. The court held that the IRS Examination Division was required to notify the Respondent five days in advance of circulating, transferring or copying any documents received as a result of the summonses to any other division of the IRS, including the Criminal Investigation Division.

FACTUAL BACKGROUND

The dispute began when a revenue agent sought to review certain documents relating to various other civil investigative issues. The Respondent submitted a copy of the trust instrument to the agent but restricted him from photocopying and disclosing it to anyone without the trustees' permission. The agent initially agreed but then returned the document to Respondent explaining that it was impossible for him to complete this investigation with such a restriction. Two IRS summonses followed and were served on the Respondent for testimony and production of documents. He refused, and the IRS brought an action to enforce the summonses. At the hearing the IRS

established as required by law four criteria: (1) a legitimate purpose for the investigation, (2) an inquiry relevant to the purpose, (3) that the information sought was not already in the possession of IRS and (4) that the IRS had complied with the administrative steps required by the code. The Respondent did not dispute the agent's declaration that the summonses were for civil tax purposes, but he wanted protection in the event that the records were to be given to the United States Attorney's Office for criminal prosecution. The magistrate, however, issued an even broader order. The order precluded the IRS from circulating, transferring or copying the summoned documents to any other division of the IRS including but not limited to the Criminal Investigation Division without five days prior notice to the Respondent to allow him to dispute the proposed action. The district court adopted the magistrate's decision and found that the restriction was not excessive because it was temporary.

Importantly, the district court found that the government had met its burden of showing that the summonses were enforceable and held that they should be enforced, but also found that there was no prejudice to the government to provide notice that a criminal investigation had ensued. The opinion read that if the Examination Division of the IRS wished to circulate, transfer or copy the subject documents to any other division of the IRS, including but not limited to the Criminal Investigation Division, the IRS was required to notify Respondent of such intention, and Respondent was given five days prior to any such circulation or transfer to file and serve a motion for an order prohibiting the intended action. The district court reasoned that the restrictions

against the IRS's internal use of the summoned information were justified because the statute relating to summonses "does not address whether the IRS can seek documents for one stated purpose and then transfer the documents to another division for another unstated purpose" and the restriction was temporary. In so ruling, the court held that the IRS had not demonstrated that the requirements for summons enforcement were satisfied with regard the use of the summoned information in a *criminal* investigation and that the Respondent was entitled to object to the use of the information should the purpose of the investigation change to a criminal one.

SUMMONS ENFORCEMENT

The summons power is an investigative tool provided by Congress to enable the IRS to discharge its duty to make determinations and assessments of all taxes imposed by the Internal Revenue Code. *See Donaldson v. United States*, 400 U.S. 517, 523-24 (1971). If the summoned party refuses to produce requested documents the government must seek judicial enforcement. *See* 26 U.S.C. §§ 7402 and 7604. This court reviews a summons enforcement decision under the clearly erroneous standard. *United States v. Author Services, Inc.*, 804 F.2d 1520, 1524 (9th Cir. 1986). The government is required to meet four essential factual standards set forth in *United States v. Powell*, 379 U.S. 48, 57-58 (1964), that is, (1) that the investigation is conducted for a legitimate purpose; (2) that the materials sought are relevant for that purpose; (3) that the IRS does not already possess the materials sought; and (4) that the IRS has complied with administrative regulations. *Id.* at 85; *Author*, 804 F.2d at 1524. Both the magistrate and district

court found that the government had met its burden of establishing that the summonses were enforceable.

This court has held that restrictions may be placed on IRS summonses.[1] In *Author*, 804 F.2d 1520 (9th Cir. 1986) the Ninth Circuit, relying on two Fifth Circuit decisions which were later overruled by the Fifth Circuit, held that the district courts have "considerable discretion" in establishing the terms of summonses. The court stated: "[C]ourts routinely modify summonses to protect taxpayers' interests. . . . This power has been construed to give a court the authority to condition enforcement of a summons on an IRS agreement to cease *improper* disclosures." *Id.* at 1525 (emphasis added). See also, *United States v. Zolin*, 809 F.2d 1411 (9th Cir. 1987). This court, however, has not upheld all limitations imposed on the enforcement of summonses. In *United States v. Abrahams*, 905 F.2d 1276, 1286-87 (9th Cir. 1990) it was first recognized that the summons enforcement hearing is narrowly defined and carefully circumscribed. "'From inception through hearing;' the proceeding '[is] strictly limited to granting or denying

[1] In contrast to the Ninth Circuit, the Fifth Circuit held in the decision *en banc* of *United States v. Barrett*, 837 F.2d 1341 (5th Cir. 1988) that a district court could not conditionally enforce an IRS summons. The court "refused to impose limitations upon the IRS' summons authority unless it found explicit congressional directives to do so." *Id.* at 1349. The Supreme Court of the United States was equally divided on the question when it affirmed the Ninth Circuit in *United States v. Zolin*, 109 S. Ct. 2619, 2625 (1989); *Church of Scientology of California v. United States*, 113 S. Ct. 447, 451 N.7 (1992). Because the affirmance in *Zolin* was evenly divided on the disclosure issue, the affirmance is not "authority for the determination of other cases, either in this or in inferior courts." *Hertz* v. *Woodman*, 218 U.S. 205, 213-14 (1910).

enforcement of the terms of the specific summons.'" *Id.* at 1287 quoting from *United States v. First National State Bank of New Jersey*, 540 F.2d 619, 624-25 (3d Cir. 1976). It was then held that the district court's restriction that IRS agents investigating a taxpayer could not interview his clients without the taxpayer's presence was an abuse of discretion in setting the terms of the enforcement order. *Id.* at 1286-87. The decision clearly distinguished between a valid restriction on a summons which is related "to the enforcement of the summons" and an invalid restriction encompassing an inquiry into the IRS investigation. *Id.* at 1287.

The district court in setting the restrictions in this case appeared to be under the misimpression that the law does not allow the IRS to seek documents for one stated purpose and then without notice transfer the documents to another division for another purpose and in particular to the Criminal Investigation Division for purposes of initiating a criminal investigation.[2] However, in *Donaldson v. United States*, 400 U.S. 517 (1971) the Supreme Court specifically rejected the argument that a summons could not be used in aid of an investigation that had the potential of resulting in the criminal prosecution against the taxpayer. The Supreme Court stated:

> *Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct.* The regulations are positive.

[2] A review of the well written district court decision and the record of the hearing before the court indicates that the judge did not have the benefit of the compelling argument made on appeal that the notice and five-day waiting period might seriously jeopardize a criminal investigation.

(citations omitted) The underlying statutes are just as authoritative. Section 6659(a)(2) of the Code defines the term "tax," as used in the Code and, hence, in the authorizing § 7602, to include any addition or penalty. Section 7602 contains no restriction; further, it has its ascertainable roots in the 1939 Code's § 3614 and, also, § 3615(a)-(c), which, by its very language and by its proximity to § 3616 and § 3654, appears to authorize the use of the summons for investigation into criminal conduct. There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance. (citations omitted) *To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forgo either the use of the summons or the potentiality of an ultimate recommendation for prosecution.* We refuse to draw that line and thus to stultify enforcement of federal law. (emphasis added)

Id. at 535-6. Indeed "[t]his result is inevitable because Congress has created a law enforcement system in which criminal and civil elements are inherently intertwined." *LaSalle National Bank v. United States*, 437 U.S. 298, 309 (1978); *see also United States v. Cromer*, 483 F.2d 99, 101 (9th Cir. 1973) (IRS summons valid where criminal recommendations were not made until after issuance of the summons); *United States v. Rosinsky*, 547 F.2d 249, 254 (4th Cir. 1977) (subsequent recommendations of criminal prosecution does not alter the validity of the IRS summons). Furthermore, Congress has now provided for the use of IRS summonses in tax investigations where the

only purpose is to uncover evidence of tax crimes except when the reference of a case to the Department of Justice for prosecution or a grand jury investigation is in effect. *See* 26 U.S.C. § 7602(b). It was undisputed that there was no criminal referral of this case to the Department of Justice. Hence, the possibility that the IRS might convert the focus of its investigation from a civil purpose to a criminal one did not justify imposing the restriction on the summonses in this case.

Furthermore, the restrictions placed on the summonses in this case exceeded the limited power of the court in granting or denying the enforcement of the summonses. Significantly, the district court found that the IRS met the four standards for enforcement of the summonses. The restrictions placed on the summonses, however, dealt specifically with "the elements of the IRS investigation" prohibited in *Abrahams*, 905 F.2d at 1287. It is easily imaginable how the restriction could hamper a criminal investigation which may emerge during the civil investigation if the IRS were required to notify the taxpayer of its intention to redirect the investigation to the Criminal Division and then *wait* five days for an objection. During that five-day period of time despite the anticipated need to seek search warrants, arrest warrants, wire interceptions, or to initiate an undercover or a grand jury investigation the government would be paralyzed and precluded from taking any such action during the holding period. The restriction could well shatter any possibility of an effective criminal investigation and potential prosecution.

The Respondent argues that this court in *Author* and *Zolin* upheld comparable district court orders restricting the IRS from delivering documents which

were produced in response to a summons to any other government agency. Significantly, however, those orders expressly *excluded* disclosures relating to criminal tax prosecutions from the scope of the restrictions.[3]

Finally, the majority opinion produces the anomalous result that the IRS, with significant congressionally created powers of civil and criminal law enforcement, faces a real threat of compromising a criminal investigation because it employs one of those powers—a summons. Other law enforcement agencies which commence civil investigations later converted to criminal investigations, however, will pay no such penalty.

I would hold that the district court abused its discretion in restricting the IRS from circulating, transferring or copying the documents produced in response to the summonses to any other division of the IRS, including but not limited to the Criminal Investigation Division, and requiring that the taxpayer be notified and allowed five days prior to any circulation or transfer to file a motion prohibiting the action. This restriction is well removed from the issue of the summons enforcement and, therefore, outside the boundaries of the court's role in those proceedings.

For the foregoing reasons the judgment appealed from should be reversed.

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[3] *Author* and *Zolin* are also distinguishable because there were several cases in different courts in litigation between the taxpayer and various governmental agencies. The decision allowing the restriction in those cases was motivated by the court's "real fear" that the information acquired as a result of the summonses would "in effect" be used for discovery purposes in the other civil matters. *Author*, 804 F.2d 1526.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Misc. No. 92-00169-DAE

UNITED STATES OF AMERICA, AND LESLIE M. NISHIMURA, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE, PETITIONERS

v.

LADDIE F. JOSE, TRUSTEE OF JOSE BUSINESS TRUST AND JOSE FAMILY TRUST, RESPONDENT

[Filed: June 25, 1993]

ORDER ADOPTING THE FINDINGS AND RECOMMENDATION OF THE MAGISTRATE JUDGE REGARDING ENFORCEMENT OF INTERNAL REVENUE SERVICE SUMMONSES

Petitioners United States of America and Leslie M. Nishimura, a Revenue Agent of the Internal Revenue Service (IRS), object to Magistrate Judge Barry M. Kurren's Findings and Recommendation enforcing two IRS summonses issued to respondent Laddie Jose but requiring petitioners to notify respondent five days in advance of circulating, transferring or copying summonsed information to any other IRS division. Petitioners contend that the court has no authority to restrict any internal IRS use of the

summonsed documents. After reviewing the petition, the objections, and the record herein, the court ADOPTS the Magistrate Judge's Findings and Recommendation.

BACKGROUND

Petitioners are conducting a civil investigation of the tax liabilities of two trusts, the Jose Business Trust and the Jose Family Trust. Respondent Laddie Jose is the trustee of both trusts and is in control of documents sought by petitioners. In response to respondent's refusal to comply with two IRS summonses requesting these documents, petitioners filed a miscellaneous petition on December 21, 1992, pursuant to 26 U.S.C. §§ 7402(b), 7604(a) (1986)[1] for judicial enforcement of the two summonses. Respondent filed an objection to the petition on March 8, 1993.

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[1] Section 7402 provides in pertinent part:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

26 U.S.C. § 7402(b) (1986). Section 7604 provides in pertinent part:

> If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

26 U.S.C. § 7604(a) (1986).

On April 22, 1993, Magistrate Judge Barry M. Kurren issued a Findings and Recommendation regarding Enforcement of Internal Revenue Service Summons concluding: (1) that the IRS summonses issued to respondent are valid and should be judicially enforced; and (2) that the IRS must notify respondent five days in advance before circulating, transferring, or copying the summonsed documents to any other division of the IRS, including its Criminal Investigation Division.

Petitioners object to the second finding, claiming that the court does not have the discretion to impose such a requirement and, in the alternative, that there is no factual basis for such a finding.

STANDARD OF REVIEW

Pursuant to Local Rule 404-2, any party may object to a magistrate judge's case dispositive proposed order, findings, or recommendations. This district court makes a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or part, the findings or recommendations made by the magistrate judge.

DISCUSSION

The court must decide whether it may restrict enforcement of petitioners' summonses by requiring the IRS to notify respondent five days in advance before circulating, transferring, or copying the summonsed documents to any other division of the IRS, including its criminal Investigation Division.

In order to enforce an IRS summons pursuant to Sections 7402(b) and 7604(a), the court must factually determine if "the investigation will be conducted pursuant to a legitimate purpose, [if] the inquiry may be

relevant to the purpose, [if] the information sought is not already within the commissioner's possession, and (if] the administrative steps required by the Code have been followed." *United States v. Powell*, 375 U.S. 48, 59 (1964). In the instant case, petitioners have represented that the summonsed documents are for the purpose of a civil investigation. Magistrate Kurren found that a civil investigation was a legitimate purpose and that the summonses are valid and should be enforced. Neither party objected to this finding; therefore the court adopts it as its own.

Magistrate Kurren did not address whether the Powell requirements would be satisfied in the event petitioners decide to pursue a criminal tax investigation because that question was not before him. As a result, Magistrate Kurren wanted to ensure that respondent have an opportunity to object to the summoned documents being used for a criminal investigation and recommended the disputed requirement of enforcement.

Petitioners, however, argue that the court cannot impose such a restriction on the IRS' use of the summoned documents. The court disagrees. It is well settled that a district court may restrict enforcement of an IRS summons. The Ninth Circuit has held that the conditions of an enforcement order lie within the district court's considerable discretion. *United States v. Author Services*, 804 F.2d 1520, 1525 (9th Cir. 1986); *see also United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987) (summons enforced on condition that IRS refrain from disclosing summoned information to other agencies), *aff'd and remanded on other grounds*, 491 U.S. 554 (1989); *United States v. Goldman*, 637 F.2d 664, 667 (9th Cir. 1980) (irrelevant information sought by summons not enforced);

United States v. Luther, 481 F.2d 429, 432-33 (9th Cir. 1973) (irrelevant information not covered by summons). In this context, monitoring the IRS' use of summonsed documents is "an appropriate exercise of the district court's discretion," *Zolin*, 809 F.2d at 1417, and the court is free to determine the terms of enforcement. *Author Services*, 804 F.2d at 1525.

Petitioners next argue that there is no factual basis for imposing such a requirement on summons enforcement because the law does not distinguish between civil and criminal aspects of a tax investigation. They cite 28 U.S.C § 7602[2] and *Donaldson v. United States*, 400 U.S. 517 (1971), in support of this claim.

While Section 7602 does not condition the IRS' use of summoned material in any way, the IRS' investigative powers are not unlimited. *See United States v. Goldman*, 453 F. Supp. 508, 511 (C.D. Cal. 1978), *aff'd*, 637 F.2d 664 (9th Cir. 1980). The statute merely

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[2] Section 7602 provides in pertinent part:

> For the purpose of ascertaining the correctness of any return . . . the Secretary is authorized—(1) To examine any books, papers, records, or other data which may be relevant to material to such inquiry; (2) To summon the person liable for tax . . . to appear before the Secretary . . . to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry. . .
>
> The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

28 U.S.C. § 7602(a) (1986).

states that an investigation "into any offense" is a legitimate purpose for summoning documents. 28 U.S.C. § 7602(b). It does not address whether the IRS can seek documents for one stated purpose and then transfer the documents to another division for another unstated purpose. Furthermore, the restriction does not unilaterally limit the IRS from ever circulating or transferring the summoned information; rather the restriction is a temporal delay which may not restrict use of the summonsed information at all. For example, respondent may choose not to file and serve a motion for an order of prohibition of circulation or transfer within the five day period. Alternatively, a court may deny respondent's motion.

Nor does Donaldson support petitioners' contention. The question in *Donaldson* was whether an individual taxpayer may intervene in judicial enforcement proceedings for a summons issued to voluntarily compliant third-parties on the basis of his fears of criminal prosecution. Here, respondent is granted the opportunity to object to a criminal tax investigation of himself. Summons enforcement is judicially administered in "'an adversary proceeding' affording the opportunity for challenge and 'complete protection to the witness.'" *Donaldson*, 400 U.S. at 539. In this case, enforcement is restricted by requiring that the IRS notify respondent five days prior to circulating or transferring the summonsed documents. This is to give respondent Jose enough time to challenge circulation of the summonsed information. Petitioners attempt to distinguish a long line of Ninth Circuit case law holding that courts do have authority to restrict judicial enforcement of summons to support their contention, but the law is clear.

"The terms of an enforcement order rest within the discretion of the district court, and its discretion is 'considerable.'" *Author Services*, 804 F.2d at 1525.

For all the reasons discussed above, the court adopts in full the Magistrate's Findings and Recommendation to: (1) enforce petitioners' summonses, and (2) require petitioner to give respondent five days notice if it decides to circulate or transfer the summonsed documents.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 25, 1993.

/s/ David Alan Ezra
DAVID ALAN EZRA
United States District Judge

United States of America and Nishimura v. Laddie F. Jose, Misc. No. 92-00169 DAE; ORDER ADOPTING THE FINDINGS AND RECOMMENDATION OF THE MAGISTRATE JUDGE REGARDING ENFORCEMENT OF INTERNAL REVENUE SERVICE SUMMONSES

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Misc. No. 92-00169 DAE

UNITED STATES OF AMERICA, AND LESLIE M. NISHIMURA, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE, PETITIONERS

v.

LADDIE F. JOSE, TRUSTEE OF JOSE BUSINESS TRUST AND JOSE FAMILY TRUST, RESPONDENT

[Filed: Apr. 22, 1995]

FINDINGS AND RECOMMENDATION REGARDING ENFORCEMENT OF INTERNAL REVENUE SERVICE SUMMONSES

After briefing by both parties herein, a hearing was held on March 30, 1993 before the court, on the government's Petition to Enforce Internal Revenue Service Summonses. Appearing on behalf of the Petitioners was Michael Chun, Assistant United States Attorney, and appearing on behalf of the Respondent was Benjamin B. Cassiday, III, Esq. After review of the materials submitted by the parties herein and oral argument at the hearing, the court hereby finds as follows:

1. That the Internal Revenue Service Summonses issued to Respondent LADDIE F. JOSE are valid and shall be responded to by LADDIE F. JOSE; and

2. That it has been represented to the Court by Petitioners that the documents produced in response to the Internal Revenue Service Summonses are for use in a civil investigation and that there is no ongoing criminal investigation of either the trustee, Laddie Jose, or the trust entities.

Based on the foregoing, it is recommended that an order issue requiring compliance with the summonses and further specifying that should it be deemed by the Examination Division of the I.R.S. that if it wishes to circulate, transfer or copy the subject documents to any other division of the I.R.S., including but not limited to the Criminal Investigation Division, I.R.S. shall notify Respondent LADDIE J. JOSE of such intention, and Respondent shall be allowed five (5) days prior to any such circulation or transfer to file and serve a motion for an order prohibiting the intended circulation or transfer.

DATED: Honolulu, Hawaii, APR. 22, 1993.

/s/ Barry M. Kurren
BARRY M. KURREN
United States Magistrate Judge

Misc. No. 92-00169DAE, United States of America v. Jose; FINDINGS AND RECOMMENDATION REGARDING ENFORCEMENT OF INTERNAL REVENUE SERVICE SUMMONSES

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-17028

D.C. No. Misc-92-00169-DAE

UNITED STATES OF AMERICA; LESLIE M. NISHIMURA, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE, PLAINTIFFS-APPELLANTS

v.

LADDIE F. JOSE, TRUSTEE OF JOSE BUSINESS TRUST AND JOSE FAMILY TRUST, DEFENDANT-APPELLEE

[Filed: Feb. 29, 1996]

ORDER

Before: KOZINSKI and HAWKINS, Circuit Judges, and SILVER,* District Judge.

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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* Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-17028

CT/AG#: Misc.-92-00169-DAE

UNITED STATES OF AMERICA; LESLIE M. NISHIMURA, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE, PLAINTIFFS-APPELLANTS

v.

LADDIE F. JOSE, TRUSTEE OF JOSE BUSINESS TRUST AND JOSE FAMILY TRUST, DEFENDANT-APPELLEE

[Filed: Mar. 13, 1996]

JUDGMENT

APPEAL FROM the United States District Court for the District of Hawaii (Honolulu).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal in this court be, and hereby is dismissed.

Filed and entered December 7, 1996

[A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
March 11, 1996
by /s/ Juanja J. Ross
Deputy Clerk]

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Case Number: Misc. 92-00169-DAE

UNITED STATES OF AMERICA, AND LESLIE M. NISHIMURA, REVENUE AGENT OF THE INTERNAL REVENUE SERVICE, PETITIONERS

v.

LADDIE F. JOSE, TRUSTEE OF JOSE BUSINESS TRUST AND JOSE FAMILY TRUST, RESPONDENT

[Entered: Aug. 18, 1993]

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for trial by
jury. The issues have been tried and the jury has rendered its
verdict.

☒ Decision by Court. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered pursuant to the "Order Adopting the Findings And Recommendation

of the Magistrate Judge Regarding Enforcement of Internal Revenue Service Summonses," which was filed on June 25, 1993.

AUG. 18, 1993

WALTER A.Y.H. CHINN
Clerk

cc:all counsel

/s/ Sona P. Akana
(By) Deputy Clerk